No. 10,540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARON ROSENSWEIG and ABE ROSENSWEIG,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

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Statement.

At the time this appeal came on for hearing on March 24, 1944, oral argument was restricted by reason of the fact that the cases of *Yakus v. United States* and *Rottenberg v. United States,* then awaiting decision by the United States Supreme Court, might be determinative of most of the issues here involved. Leave, however, was granted counsel to file a supplemental brief. After the decision of the Supreme Court in the *Yakus* and *Rottenberg* cases (64 S. Ct. 660, March 27, 1944), appellants filed a supplemental brief which raises two questions which appellants

contend were not covered by the decision of the Supreme Court.

The first contention of appellants is that the Regulation "is without application to the offense charged." They urge that a side of beef, admittedly sold over the ceiling price prescribed by the Regulation, is an "agricultural commodity" and that because such ceiling price was not approved by the Secretary of Agriculture as prescribed by Section 3(e) of the Act, the Regulation "does not cover and is not applicable to the sale of the side of beef."[1] (App. Supp. Br. p. 5.)

Point II of Appellant's Supplemental Brief again raises the question of whether the trial court abused its discretion in refusing to vacate the judgment and sentences, in refusing permission to re-enter pleas of not guilty, and in denying a new trial. This question was fully treated by the Government in its original brief (Br. pp. 26-43), and we do not think it necessary to add any further comment or analysis thereto.

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[1]All of the powers and functions of the Secretary of Agriculture under the Act have been transferred to the War Food Administrator. Wherever in this brief any reference is made to the Secretary of Agriculture it should be construed as meaning and including the War Food Administrator.

I.

The Contention That the Regulation Never Became Effective Is an Attack on the Validity of the Regulation and Cannot Be Considered in This Case.

Appellants argue that a side of beef is an agricultural commodity; that Section 3(e) of the Act prohibits the Administrator from taking any action under the Act with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; that the Secretary of Agriculture never approved the maximum prices prescribed by the Regulation for sides of beef and that therefore the Regulation to the extent that it prescribes maximum prices for sides of beef never became effective. This is just another way of saying that the Regulation is invalid because not approved by the Secretary of Agriculture. The Act does not provide that Regulations fixing prices for agricultural commodities shall be issued jointly by the Administrator and the Secretary of Agriculture. Under Section 2(a) of the Act Regulations establishing maximum prices may be issued only by the Administrator. Section 3(e) merely prohibits the Administrator from issuing a Regulation fixing maximum prices for agricultural commodities without prior approval of the Secretary of Agriculture. The latter's approval is only one of many statutory requirements which must be observed by the Administrator in issuing a Regulation. The approval of the Secretary of Agriculture need not be manifested in any particular manner. It may be given orally or in writ-

ing. It need not be endorsed upon the Regulation. If the Administrator should issue a Regulation which fixed maximum prices for agricultural commodities without the prior approval of the Secretary of Agriculture, the Regulation would be invalid, just as it would be invalid if the Administrator failed to observe any of the other requirements prescribed by the statute. But it could not be successfully contended that the Regulation had not been issued. Therefore, in saying that the Regulation never became effective, appellants are in reality attacking the validity of the Regulation on the ground that the Administrator failed to abide by one of the requirements of the statute.

Since the contention now urged by the appellants is simply an attack on the validity of the Regulation, it follows that it cannot be considered in the present proceeding.

Yakus v. United States, 64 S. Ct. 660;

U. S. v. Pepper Bros, 3d Cir., No. 8602, decided May 3, 1944.

Nor can appellants draw any comfort from the fact that the Supreme Court in the *Yakus* case did not pass on the question "whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face."

As said above, the approval of the Secretary of Agriculture to a Regulation prescribing maximum prices for agricultural commodities need not be manifested in any particular manner. It may be given orally, or by interdepartmental memoranda, by letter or in any other manner. Only by resort to extrinsic evidence could it be ascertained whether or not the Secretary of Agriculture had approved the Regulation involved in this case. The Regulation, therefore, is not invalid on its face.

Furthermore, Section 204(d) bars all attacks on the validity of a Regulation in a proceeding such as this, irrespective of whether the alleged invalidity appears on the face of the Regulation or not.

The language of Section 204(d) of the Act is plain. No court, except the Emergency Court of Appeals and the Supreme Court, has jurisdiction or power to consider the "validity" of maximum price regulations. The statute speaks without qualification or limitation of any kind of "validity." In fact, Section 204(d) provides that one of the matters falling within the exclusive jurisdiction of the Emergency Court of Appeals is the authority to determine whether a challenged Regulation is "in accordance with law," a provision which clearly encompasses the objection raised by appellants. In favorably reporting this section of the statute to Congress, the Senate Committee on Banking and Currency stated (Sen. Rep. No. 931, 77th Cong., 2nd sess., 1942, at pp. 7-8, 24):

> "The Emergency Court . . . may examine the entire record before the Administrator to determine *whether he acted in accordance with the statute,* whether the procedure that he has followed is in accordance with accepted standards of due process of law, and whether he has exercised a reasonable judgment on questions committed to his discretion.
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> * * * * * * * *
>
> "By applying these standards the [Emergency] Court [of Appeals] has ample power to keep the Administrator within the bounds prescribed by the bill." (Emphasis supplied.)

The Committee report continues (p. 24):

> "Section 204(d) further provides expressly that no court, other than the Emergency Court and the Su-

preme Court shall have jurisdiction or power to consider the *validity, constitutional or otherwise,* of any regulation or order issued under Section 2." (Emphasis supplied.)

The purpose of Section 204(d) is further revealed by the following excerpt from the report of the Senate Committee (p. 7): "The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in different circuits on the same regulations."

This clear legislative intent has been given full effect in cases arising under the Act. In *Brown v. Cummins Distilleries Corp.,* 53 F. Supp. 659 (W. D. Ky., 1944), the court considered the same question as that presented by the instant case. In holding that Section 204(d) precluded consideration as to whether the Regulation had been approved by the Secretary of Agriculture, the court said:

> "Defendants further contend that the sales in question, even though construed as sales of whiskey, are not subject to the Act because Section 3 thereof restricts in the way provided therein the establishment of a maximum price for any commodity processed or manufactured in whole or substantial part from any agricultural commodity, as referred to hereinabove. It is pointed out that whiskey is processed or manufactured from an agricultural commodity and that the Regulation in question does not establish for whiskey in bulk a maximum price according to the formula provided by the Act. This may be true, but it does not follow that a maximum price for whiskey was not established by the Regulation, although reached by an incorrect or invalid procedure. Undoubtedly this

Court has the right to construe the regulation in order to determine its scope, but after Court, in so doing, has not further jurisdiction to adjudge the regulation invalid."

In *Brown v. Liniavski et al.*, 53 F. Supp. 513 (S. D. N. Y., 1943), the defendants attacked the validity of a Regulation governing export prices. They argued that the Act nowhere granted authority to the Administrator to govern export prices, and that the Regulation was therefore invalid as a matter of law. In holding that Section 204(d) precluded consideration of such a problem, the District Court said:

"There is no exception provided in the section, except the right given to the Emergency Court of Appeals. I see no reason for making a distinction between the following types of invalidity:

a. That the Price Administrator acted arbitrarily or capriciously in promulgating a regulation.

b. That the Price Administrator had promulgated a regulation which the statute does not authorize him to fix.

c. That the Price Administrator had promulgated a regulation which regulation is based upon an interpretation of the Act which may be said to be unconstitutional. In other words, a regulation invalid as being an unconstitutional attempt to exercise legislative power.

"Each one of these of the above three objections to a regulation is an attack upon the validity of the regulation and under the plain terms of the Act may not be asserted in this Court, but is within the exclusive jurisdiction of the Emergency Court of Appeals."

Similarly, in *Brown v. Oklahoma Operating Co.* (W. D. Okla., 1943), OPA Service 620:128, it was argued by defendant that the Regulation controlling the price of laundry services was not a "commodity" and therefore unauthorized by statute, the court stated:

> "Whether or not the definition of the term 'commodity' in Section 302(e) of the Emergency Price Control Act of 1942 includes the operation of a laundry is a question involving the validity of Maximum Price Regulation No. 165, a matter which this court is precluded from considering under the provisions of Section 204(d) of the Emergency Price Control Act of 1942."

Clearly the disruption which would be caused in the price control program by permitting decisions, and possible conflicts of decisions in the various state and federal courts throughout the country as to the validity of Regulations for defects allegedly appearing on the face of the Regulation, would be no less injurious to the war effort than the disruption caused by decisions which reach the same result on grounds allegedly not appearing on the face of the Regulation.

From the foregoing, it is, we submit, obvious that appellants' contention that the Regulation never became effective is an attack upon the Regulation which cannot be considered in this proceeding.

If the contention could be considered, it is plainly without merit because sides of beef are not agricultural commodities and the approval of the Secretary of Agriculture is not required as a condition to prescribing maximum prices therefor.

II.

Sides of Beef Are Not Agricultural Commodities but Products Processed From Agricultural Commodities and the Approval of the Secretary of Agriculture to the Establishment of Maximum Prices Therefor Is Unnecessary.

As we have previously shown, the Act draws a distinction between agricultural commodities and products processed from agricultural commodities. Section 3(e) requires the approval of the Secretary of Agriculture prior to any action being taken by the Administrator with respect to agricultural commodities, but his approval is not required with respect to any action relating to products processed from agricultural commodities. This is clearly shown by the legislative history of the section.

Section 3(e) was adopted as a result of an amendment sponsored by Senator Bankhead while the bill which subsequently became the Emergency Price Control Law was being debated in the Senate. In its original form the amendment proposed by Senator Bankhead read as follows:

> "Notwithstanding any other provision of law, no action shall be taken by the Administrator or any other person with respect to an agricultural commodity *or commodity processed or manufactured in whole or in substantial part from any agricultural commodity* without the prior approval of the Secretary of Agriculture." (Emphasis supplied.)

The amendment thus in its original form covered not only agricultural commodities but products processed therefrom. This is exactly the way the appellants would have the court construe the section. Senator Bankhead, the

sponsor of the amendment, however, struck from the amendment the provisions relating to commodities processed or manufactured from agricultural products, saying (88 Cong. Rec. 160, 77th Cong., 2d sess.):

> "In addition to agricultural commodities, the original amendment included commodities processed or manufactured in whole or in substantial part from any agricultural commodity . . . of course we have no desire to have the amendment cover anything but products dealt with by the Secretary of Agriculture and in the production and price of which the farmer, the agricultural producer, has a direct, immediate, pecuniary interest; . . . so now the amendment is brought right down to agricultural commodities."

Other statements made during the course of the debate confirm this construction.

Thus Senator McNary said:

> "Mr. President, I know from reading the bill that any fair-minded person must come to the conclusion that the words 'agricultural commodity' refer to the raw materials produced in the farm. Otherwise, there would not be a separate subsection dealing with processed and manufactured goods. The two subsections, read together, define the term.
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> * * * * * * * *
>
> "When we want to enter the field of refined, manufactured, or processed commodities, we use the proper language." (88 Cong. Rec. 182, 77th Cong., 2nd sess., 1942.)

Senator Overton made a similar statement:

> "When the Bankhead amendment refers to agricultural commodities it refers solely to raw agricul-

tural commodities. It does not refer to processed agricultural commodities or commodities manufactured in whole or in substantial part from agricultural commodities." (88 Cong. Rec. 173, 77th Cong., 2nd sess., 1942.)

And Senator George repeated the same thought:

"As I understand, the amendment applied strictly to agricultural products and not to processed or manufactured articles made from manufactured products." (88 Cong. Rec. 180, 88th Cong., 2nd sess., 1942.)

This construction of Section 3(e) of the Act finds confirmation in other subsections of Section 3. Sections 3(a) and (b) refer only to agricultural commodities and the methods which are to be used in determining parity prices. Section 3(c) specifically provides that the producers of agricultural commodities (*i. e.*, the farmers) shall obtain parity prices for agricultural commodities, and that maximum prices established on commodities processed or manufactured therefrom shall not be below the price as determined by Section 3(a). Section 3 of the Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. App. Supp. II, Sec. 961), likewise makes this distinction, wherein it provides:

"That in the fixing of maximum prices on products resulting from the processing of agricultural commodities, including livestock, a generally fair and equitable margin shall be allowed for such processing; Provided further, that in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity, as provided by this Act, adequate weighing shall be given to farm labor."

Such a distinction is well recognized.

Webster's New International Dictionary, 2nd Ed., 1939;

Kennedy v. State Board of Assessment and Review, 276 N. W. 205, 224 Ia. 405 (1937);

Fuhram & Forster Co. v. Com'r of Internal Revenue, 114 F. (2d) 863 (C. C. A. 7th, 1940), and

Colbert Mill and Feed Co. v. Okla. Tax Com'n, 188 Okla. 366, 109 F. (2d) 504.

It is plain, therefore, that no approval of the Secretary of Agriculture is required with respect to any action taken by the Administrator in reference to products processed from agricultural commodities as distinguished from agricultural commodities. This is not seriously contested by appellants who now contend that sides of beef are not products processed from agricultural products but simply agricultural commodities. We think the contrary is obvious. Live cattle are agricultural commodities. When they are slaughtered and their carcasses are dressed a processed product results. In other words before carcasses and sides of beef can be produced the cattle must be subjected to processing.

Appellants in contending that beef carcasses are agricultural commodities place their entire reliance on the definition of "processed products" contained in Revised Maximum Price Regulation No. 169. That definition has nothing to do with the case. We are not here concerned with the meaning of the term "processed products" as used in the Regulation but with the meaning of the terms "agricultural commodities" and "products processed from agricultural commodities" as used in the statute. The Regulation prescribes maximum prices for (a) beef carcasses

and wholesale cuts, (b) veal carcasses and wholesale cuts and (c) processed products. All of these products, including carcasses and wholesale cuts, are products processed from agricultural commodities and none of them is an agricultural commodity.

It follows that in any case the approval of the Secretary of Agriculture to establishment of maximum prices for sides of beef was and is unnecessary.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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